

# WEST VIRGINIA LEGISLATURE

## 2018 REGULAR SESSION

Introduced

### House Bill 4228

FISCAL  
NOTE

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CAPUTO AND DISERIO

[Introduced January 19, 2018; Referred  
to the Committee on Industry and Labor then the  
Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto five new  
2 sections, designated §5-22-4, §5-22-5, §5-22-6, §5-22-7 and §5-22-8, all relating to  
3 requiring the use of items of goods and equipment manufactured in the United States in  
4 government construction contracts; specifying the types of public entities and the types of  
5 contracts to which provisions apply; setting forth duties and responsibilities of public  
6 entities and bidders on contracts; providing conditions upon which provisions may be  
7 waived; setting forth the duties and responsibilities of the Division of Labor; providing for  
8 violations and penalties; providing for hearings; defining terms; and requiring rule-making.

*Be it enacted by the Legislature of West Virginia:*

## **ARTICLE 22. GOVERNMENT CONSTRUCTION CONTRACTS.**

### **§5-22-4. Definitions.**

1 As used in this article, unless the content clearly requires a different meaning:

2 “Item” or “Item of goods or equipment” means:

3 (A) Commodities, supplies, materials, equipment and any other items provided for in the  
4 contract that will remain affixed to the real property, or buildings constructed thereon, but does  
5 not mean a vendor’s equipment that does not remain with or otherwise become the property of  
6 the state; and

7 (B) An individual item, or collection of identical items, which cost \$10,000 or more, but in  
8 the case of a collection of identical items shall not include any subsequent or extra purchases of  
9 the identical items for less than \$10,000.

10 “Manufactured in the United States” means that the item is produced in the United States,  
11 manufactured in the United States or assembled in the United States from component parts or  
12 materials, regardless of origin.

13 “Public agency” or “public entity” means the State of West Virginia, its departments,  
14 agencies, boards, commissions, and institutions, and all units and political subdivisions thereof,  
15 including local school districts;

16 “United States” means the United States of America and includes all territory, continental  
17 or insular, subject to the jurisdiction of the United States.

**§5-22-5. Use of items manufactured in the United States.**

1 (a) In any instance that a contract subject to the bidding requirements of this article is  
2 estimated to exceed \$500,000, all solicitations requesting bids, and any subsequent contracts,  
3 shall specify and require that any item of goods or equipment used or supplied in the performance  
4 of the contract or any subcontract thereto shall be manufactured in the United States.

5 (b) Each public agency shall call for the use of items of goods or equipment manufactured  
6 in the United States in the design and engineering specifications for the projects to be performed  
7 under contracts subject to the bidding requirements of this article.

8 (c) Notwithstanding any provisions of subsections (a) and (b) of this section, any person  
9 responding to a solicitation for bids or designs may apply, with sufficient evidence in support of  
10 their application, to the public entity accepting public contract bids for a waiver to use foreign  
11 goods and equipment. The public entity may grant the waiver under the following conditions:

12 (1) The specified goods and equipment are not produced in the United States in sufficient  
13 quantity or otherwise are not reasonably available to meet contract requirements;

14 (2) The item of goods or equipment manufactured in the United States exceed the cost of  
15 comparable foreign-made goods or equipment by more than ten percent of the cost of that item;

16 (3) The specified goods or equipment are necessary for the protection and safety of the  
17 public or property, and no comparable American-made products are available, including, but not  
18 limited to, fire suppression systems, security systems or emergency detection or response  
19 systems; or

20 (4) In the case of a repair or maintenance project, the specified items of goods or  
21 equipment have already been installed during a previous project and replacing those items with  
22 items manufactured in the United States would create an unreasonable hardship.

23 (d) The public entity accepting public contract bids shall:

24 (1) Implement procedures for issuance of a final decision on waiver requests pursuant to  
25 subsection (c) of this section; and

26 (2) Shall report its final decision with findings to the Division of Labor.

27 (e) The public entity accepting public contract bids shall have authority to request that  
28 vendors provide, within five business days of the request, any documentation that the contracting  
29 authority deems necessary to verify compliance with this section.

30 (f) No bid shall be approved that does not comply with the requirements of this section.

**§5-22-6. Annual lists of items available and not available.**

1 (a) The Division of Labor shall develop and publish at least annually, for use by public  
2 entities accepting public contract bids, the following:

3 (1) A list of items of goods or equipment deemed to qualify as manufactured in the United  
4 States for purposes of this article;

5 (2) A list of items of goods or equipment which are not manufactured in the United States  
6 and for which a waiver can be granted pursuant to §5-22-4(c) of this code.

7 (b) The annual lists developed by the Division of Labor are for guidance to persons  
8 submitting bids or designs, and a person may not be penalized under §5-22-6 of this code for  
9 relying on these annual lists. However, the public entity accepting public contract bids has final  
10 authority to grant or deny waivers pursuant to the processes implemented under §5-22-4(d) of  
11 this code.

12 (c) In developing the lists or contracting for the development of the lists, the Division of  
13 Labor shall implement procedures to promote public input. In doing so, the Division of Labor shall  
14 annually:

15 (1) Make the lists available for public review and comment not less than thirty days prior  
16 to publication;

17 (2) Take into account all comments received and resolve disputes raised during the public  
18 comment period;

19 (3) Invite public comments as to items' availability for which no determination on  
20 availability has been made; and

21 (4) Publish the lists on the publicly accessible Internet website of the state and in the West  
22 Virginia Purchasing Bulletin.

23 (d)(1) The Division of Labor shall develop the first annual lists over a period not to exceed  
24 three years, provided that the items of goods or equipment most commonly used in such projects  
25 to be performed by contracts subject to the bidding requirements of this article which are  
26 determined to be manufactured in the United States are included in the first publication of the  
27 annual list; and

28 (2) The Division of Labor shall develop a process to annually review and amend the lists  
29 required under section in accordance with the requirements for public input under subsection (c)  
30 of this section.

#### **§5-22-7. Violations and Enforcement.**

1 (a) *Intentional Violations.* -- Any person who has responded to a solicitation for bids or  
2 designs shall be subject to the conditions set out in subsection (b) of this section if it is determined  
3 by the Division of Labor that the person intentionally:

4 (1) Represented that any item of goods or equipment used in projects to which this section  
5 applies were not manufactured in the United States, when in fact the item was manufactured in  
6 the United States; or

7 (2) Represented that any item of goods or equipment used in projects to which this section  
8 applies were manufactured in the United States, when in fact the item was not manufactured in  
9 the United States.

10 (b) If a person is found to have committed a violation as described in subsection (a) of this  
11 section, the person:

12 (1) On first offense, shall be suspended from bidding on any other state construction  
13 projects for a period of ninety days; and

14 (2) On second offense, shall be suspended from bidding on any other state construction  
15 projects for a period of one year; and

16 (3) On third or more offenses, shall be subject to debarment provided for under the  
17 provisions of §5A-3-1 et seq. of this code.

18 (c) The Division of Labor has the authority to review all projects subject to the requirements  
19 of this article for any violations as described in subsection (a) of this section, and:

20 (1) Upon a determination that a person has violated the provision of subsection (a) of this  
21 section, the Division of Labor shall issue a cease and desist order requiring the person to  
22 immediately cease all practices in violation of this section; and

23 (2) After affording an opportunity for a hearing and adjudicating that the person committed  
24 the violation, the Division of Labor shall issue a final order indicating a violation of this section,  
25 and publish the final order in sufficient manner to inform all public entities accepting public contract  
26 bids of the person's status with regards to suspension or debarment.

**§5-22-8. Rule-making.**

1 (a) A public entity accepting public contract bids shall adopt rules, applicable to the bidding  
2 process for that public entity, that are necessary to carry out the provisions of this article pursuant  
3 to the provisions of the State Administrative Procedures Act.

4 (b) The Division of Labor shall propose for promulgation, legislative rules that are  
5 necessary to exercise its powers and authority under this article pursuant to the provisions of  
6 §29A-3-1 et seq. of this code.

7 (c) The Division of Labor or any public entity accepting public contract bids may  
8 disseminate educational or any other materials designed to assist persons with regards to  
9 compliance to the provisions of this article.

NOTE: The purpose of this bill is to require available materials, supplies, equipment and other items purchased by the state and its agencies to be made in the United States.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.